A

RHB Bank Bhd v Travelsight (M) Sdn Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)–732–04 OF 2012
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
17 MAY 2013

C

Contract — Assignment — Reassignment — Deed of reassignment — Construction of — Assignment of property to bank as security for loan facilities — Whether bank contractually bound to reassign property to respondent upon full repayment of loan sum — Whether bank had obligation in equity to reassign property — Whether property reverted to developer after lawful rescission of sale and purchase agreement — Whether trial judge erred in finding that rescission was conditional on refund of purchase price by developer

D

Land Law — Assignment — Land assigned to financier — Whether under terms of loan agreement and deed of assignment bank was contractually bound to reassign property to respondent upon full repayment of loan sum — Whether bank had obligation in equity to reassign property — Whether property reverted to developer after lawful rescission of sale and purchase agreement — Whether rescission conditional

E

F

The respondent had entered into a loan agreement with the appellant bank for the purpose of purchasing a property located in Kuala Lumpur ('the property'). The loan facilities were secured by way of an assignment of the property to the appellant. Subsequently, the respondent and appellant jointly filed an application for the rescission of the sale and purchase agreement ('the SPA') for the purchase of the property on the grounds of misrepresentation by the developer of the property ('the 2001 suit'). The High Court allowed the 2001 suit and ordered the SPA to be lawfully rescinded and for the developer to refund the purchase price of the property or the sum of RM816,696 with interest to the respondent, with the said sum awarded to be used to redeem the charge over the property in favour of the appellant. Subsequently, the developer was ordered to be wound up and the developer's liquidators placed advertisements inviting tenders for the purchase of the property. The respondent filed an application to prohibit the developer's liquidators from disposing off the property ('the 2003 application') on the grounds that neither the developer nor its liquidators had refunded the sum awarded to the respondent in the 2001 suit. The respondent's 2003 application was dismissed. When the appellant bank refused to effect a reassignment of the property to the respondent, the latter filed the present originating summons. It was the

G

H

I

respondent's stand that the appellant had breached its own undertaking by its failure or refusal to execute a reassignment of the property to the respondent despite the respondent's full repayment of all the outstanding sums due to the appellant under the loan facilities. The appellant argued that following the decision in the 2001 suit, the SPA between the respondent and the developer was rescinded and that the property had effectively reverted to the developer. It was thus the appellant's contention that following the rescission of the SPA there was nothing to reassign. The trial judge was of the view that the decision of the High Court in the 2001 suit and the 2003 application was that the respondent remained the owner of the property until the refund by the developer of the sum of RM816,696 to the respondent and appellant. Hence the present appeal.

Held, dismissing the appeal with costs:

(1) At this juncture there was no need to determine the ownership of the property. Instead it was necessary to determine whether the appellant was obliged to reassign the property to the respondent pursuant to the contract between the parties. Under the terms and conditions of the loan agreement and the deed of assignment entered into between the parties, the appellant was contractually bound to reassign the property forming the subject matter of the security upon full satisfaction of the loan amount. Even if such a construction of the terms of the contract between the parties was wrong, there was an obligation in equity on the appellant to reassign the security in the form of the property following the full payment of the loan amount (see paras 16–18).

(2) The trial judge was correct in her findings that the 2001 suit provided for rescission conditional on the refund of the purchase price. Then in the 2003 application the ruling not to restrain the liquidators from selling the property was made on the assumption that the developer had refunded the purchase price pursuant to the order in the 2011 suit. Further, it should be appreciated that the respondent required a reassignment before it could acquire the locus to commence any form of proceedings against the developer and/or its liquidators for the recovery of the monies ordered to be paid to it under the 2001 suit (see paras 20).

(3) The issues raised by the appellant and the interveners to this action were premature and needed to be addressed only in an action between the respondent and the liquidators of the developer. In the circumstances, the appellant and the interveners were ordered to each pay costs of RM10,000 to the respondent (see paras 20–21).

[Bahasa Malaysia summary

Responden telah memasuki perjanjian pinjaman dengan perayu bank bagi tujuan membeli hartanah yang terletak di Kuala Lumpur ('hartanah tersebut').

Kemudahan pinjaman itu dijamin melalui penyerahan hak hartanah tersebut kepada perayu. Berikutan itu, responden dan perayu bersama memfailkan permohonan untuk pembatalan perjanjian jual beli itu ('PJB tersebut') untuk belian hartanah tersebut atas alasan salah nyata oleh pemaju hartanah tersebut ('guaman 2001'). Mahkamah Tinggi membenarkan guaman 2001 dan memerintahkan PJB tersebut dibatalkan dengan sah dan agar pemaju mengembalikan semula harga belian hartanah tersebut atau sejumlah RM816,696 beserta faedah kepada responden, dengan jumlah tersebut diawardkan untuk digunakan bagi menebus gadaian ke atas hartanah tersebut yang memihak kepada perayu. Berikutan itu, pemaju telah diperintahkan agar digulung dan penyelesai pemaju telah meletakkan iklan-iklan mempelawa penender-penender untuk belian hartanah tersebut. Responden telah memfailkan permohonan untuk melarang penyelesai pemaju daripada melupuskan hartanah tersebut ('permohonan 2003') atas alasan bahawa pemaju mahupun penyelesainya tidak mengembalikan semula jumlah yang diawardkan kepada responden dalam guaman 2001 tersebut. Permohonan 2003 responden telah ditolak. Apabila perayu bank enggan menguatkuasakan penyerahan hak semula hartanah tersebut kepada responden, responden telah memfailkan saman pemula ini. Adalah pendirian responden bahawa perayu telah melanggar akujanjinya kerana kegagalan atau keengganannya melaksanakan penyerahan hak semula hartanah tersebut kepada responden meskipun bayaran semula dengan penuh oleh responden terhadap semua jumlah tertunggak kepada kepada perayu di bawah kemudahan pinjaman tersebut. Perayu berhujah bahawa berikutan keputusan dalam guaman 2001, PJB antara responden dan pemaju telah dibatalkan dan bahawa hartanah tersebut telah secara efektif kembali kepada pemaju. Oleh itu perayu berhujah bahawa berikutan pembatalan PJB tersebut tiada apa yang diserah hak. Hakim perbicaraan berpendapat bahawa keputusan Mahkamah Tinggi dalam guaman 2001 dan permohonan 2003 adalah bahawa responden masih pemilik hartanah tersebut sehingga dibayar balik oleh pemaju sejumlah RM816,696 kepada responden dan perayu. Justeru, rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Buat masa ini tiada keperluan untuk menentukan pemilikan hartanah tersebut. Sebaliknya adalah perlu untuk menentukan sama ada perayu diwajibkan untuk memberi semula hartanah tersebut kepada responden menurut kontrak antara pihak-pihak. Di bawah terma dan syarat perjanjian pinjaman dan surat ikatan penyerahan hak yang dimasuki antara pihak-pihak, perayu adalah terikat secara kontraktual untuk menyerah hak hartanah tersebut yang membentuk hal perkara jaminan setelah jumlah pinjaman dibayar penuh. Walaupun pentafsiran terma kontrak antara pihak-pihak adalah salah, terdapat kewajipan dalam

ekuiti ke atas perayu untuk menyerah hak jaminan tersebut dalam bentuk hartanah tersebut berikutan bayaran penuh jumlah pinjaman itu (lihat perenggan 16–18).

(2) Hakim perbicaraan adalah betul dalam penemuan beliau bahawa guaman 2001 memperuntukkan pembatalan bersyarat terhadap bayaran balik harga belian. Kemudian dalam permohonan 2003 keputusan untuk tidak menghalang penyelesai daripada menjual hartanah tersebut telah dibuat atas andaian bahawa pemaju telah membayar balik harga belian menurut perintah dalam guaman 2001. Selanjutnya, ia patut dihargai bahawa responden memerlukan penyerahan hak semula sebelum ia boleh memperolehi locus untuk memulakan apa-apa bentuk prosiding terhadap pemaju dan/atau penyelesainya bagi mendapat balik wang yang diperintahkan untuk dibayar kepadanya di bawah guaman 2001 (lihat perenggan 20).

(3) Isu-isu yang ditimbulkan oleh perayu dan pencelah kepada tindakan ini adalah pramatang dan perlu dikemukakan hanya dalam tindakan antara responden dan penyelesai kepada pemaju. Dalam keadaan berikut, perayu dan pencelah diperintahkan untuk membayar setiap seorang kos RM10,000 kepada responden (lihat perenggan 20–21).]

Notes

For cases on land assigned to financier, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2553–2556.

Legislation referred to

Companies Act 1965 s 293

Appeal from: Originating Summons No 24NCVC-2748–10 of 2011 (High Court, Kuala Lumpur)

Andrew Teh (Foong Mun Yee with him) (Wong Lu Peen & Tunku Alina) for the first appellant.

Wong Rhen Yen (Ken Wayne Goik with him) (Hanif Idris & Associates) for the respondent.

Joy Appukuttan (Mohd Hashim with him) (SK Yeoh & Partners) for the interveners.

Anantham Kasinather JCA (delivering judgment of the court):

CHRONOLOGY OF THE EVENTS

6 December 1996

[1] Upon the respondent's application, the appellant granted a term loan and

overdraft facilities to the respondent. The facilities were secured by way of an assignment of the property known as Suite No 1202, Tower B, Wisma Pantai located in Kuala Lumpur (hereinafter referred to as the 'Wisma Pantai') from the respondent in favour of the appellant.

6 November 2002

[2] The respondent and appellant jointly filed an application in Kuala Lumpur High Court Originating Summons No S6-24–4147 of 2001 ('2001 suit') against Atlas Corporation Sdn Bhd ('Atlas'. The principal relief sought in the 2001 suit was for a declaration that the sale and purchase agreement between the respondent and Atlas for the purchase of the Wisma Pantai be deemed rescinded (due to Atlas's misrepresentation). Incidentally Atlas was the developer of the Wisma Pantai.

15 November 2002

[3] The court allowed the 2001 suit and ordered amongst others, the following:

(a) a declaration that the sale and purchase agreement dated 15 March 1996 (between the respondent and Atlas) was lawfully rescinded vide the respondent's letter dated 13 February 2001;

(b) Atlas was to return the sum of RM816,696 to the respondent and appellant, together with interest thereon until full settlement; and

(c) the sum awarded in para (ii) above is to be used to redeem the charge (over the Wisma Pantai) in favour of the appellant.

20 February 2004

[4] Atlas was ordered to be wound up.

1 December 2008

[5] Atlas's liquidators placed advertisements inviting tenders for the purchase of the Wisma Pantai.

12 December 2008

[6] The respondent filed an application in the winding-up action (where Atlas was ordered to be wound-up) in Kuala Lumpur High Court Companies (Winding-Up) No D7–28–946 of 2003 ('2003 application') to set aside and or

prohibit Atlas' liquidators from disposing off the Wisma Pantai. A

13 May 2009

[7] The respondent's 2003 application was dismissed. B

8 March 2011

[8] The appellant issued a letter to the respondent requesting it to forward the deed of receipt and reassignment / satisfaction of charge documents for the execution of appellant's attorney in connection with the Wisma Pantai. C

22 April 2011

[9] The respondent accepted the agreement of the appellant to reassign Wisma Pantai and made known the identity of its solicitors to effect the reassignment on its behalf. D

1 July 2011 E

[10] The appellant issued a letter to the solicitors for the respondent clarifying that the Wisma Pantai cannot be reassigned to the respondent as the respondent had obtained an order to rescind the Sale and purchase agreement in respect of the Wisma Pantai in the 2001 suit. F

28 October 2011

[11] The respondent issued an originating summons against the appellant seeking, inter alia, the following relief: G

(a) a declaration that the respondent has fully settled all the outstanding sums due to the appellant under the term loan facility (account no 7–14026–000324041) ('term loan') and the overdraft facility (account no 2142–1300029480) ('overdraft') (collectively hereinafter referred to as 'the facilities') which are secured inter alia by a deed of assignment dated 6 December 1996 entered into between the respondent and the appellant; H

(b) a declaration that the appellant has breached its own undertaking in failing, neglecting, refusing and / or unable to execute a deed of receipt and reassignment in favour of the respondent for a property known as Suite No 1202, Tower No. B, Wisma Pantai and held under master title Geran 5990, Lot 4096 & 4099, Geran 15352, Lot 2508 & 2509 and HS I

(D) 60799, Lot 2510 & 2511, Mukim Kuala Lumpur, Wilayah Persekutuan ('the property') upon the full repayment of the facilities by the respondent to the appellant;

(c) a mandatory injunction to compel the appellant, their directors, officers, employees, agents, servants and / or others acting under the instruction of the appellant that within seven days from the date of this order,the appellant shall execute a deed of receipt and reassignment and / or take all the necessary steps to reassign the rights, benefits and title in the property to the respondent in relation to the sale and purchase agreement dated 15 March 1996 executed between the respondent and Atlas; and

(d) a mandatory order to compel the appellant to furnish a detailed copy of the respondent's full statement of account for the overdraft facility (account No 2142–1300029480).

27 March 2012

[12] The learned trial judge allowed the originating summons filed by the respondent in terms of the prayers one, two, three and four set out above. The order of the learned judge made on this day forms the subject matter of this appeal.

THE APPELLANT'S AND INTERVENERS' CASE

[13] The only issue before the High Court was whether the respondent was entitled in law to seek an order for the reassignment of the Wisma Pantai after the High Court had in the 2003 application ruled that the effect of the 2001 judgment was to reduce the respondent to the status of an unsecured creditor of Atlas. The thrust of the submission of learned counsel for the appellant was that following the decision in the 2001 suit that the sale and purchase agreement between the respondent and Atlas was rescinded, the Wisma Pantai effectively reverted to Atlas. According to learned counsel for the appellant, the effect of the learned trial judge's order is to recognise a proprietary interest in Wisma Pantai in the respondent, when no such interest exists following the decision of the court in the 2001 suit. The inference being that there is nothing to reassign following the rescission of the sale and purchase agreement.

[14] Learned counsel for the interveners apart from raising the same points of law raised by learned counsel for the appellant, also relied on s 293 of the Companies Act 1965. Learned counsel for the interveners submitted that any recognition of the respondent as the owner of Wisma Pantai by the liquidators of Atlas would tantamount to a breach of s 293 of the Companies Act 1965. The breach consisting of the respondent being treated as a preferred creditor

upon the transfer of the Wisma Pantai to the respondent, when all unsecured creditors must be treated equally.

THE DECISION OF THE HIGH COURT

[15] The learned trial judge after perusing the judgment in the 2001 suit opined that the judgment did not result in the Wisma Pantai reverting to Atlas until the refund by Atlas of monies amounting to RM816,696 to the respondent and appellant. To the extent that it is not in dispute that neither Atlas nor the liquidators have refunded these monies, Her Ladyship ruled that the Wisma Pantai continued to be in the ownership of the respondent and thereby questioning the liquidators' right to sell the same. Her Ladyship also opined that her decision was fortified by the fact that in the 2003 application, Kang Hwee Gee J (as he then was) had ruled that *'the property will remain with the bank'* if the liquidators should fail to pay the sum ordered by Malik Ishak J (as he then was). Since it is common ground that the sum ordered to be paid by Malik Ishak J (as he then was) in the 2001 suit remains outstanding, Her Ladyship ruled that the effect of the decision of the High Court in the 2001 suit and the 2003 application is that the respondent remains the owner of the Wisma Pantai. The learned trial judge then proceeded to make the orders in terms of prayers one, two, three and four of the originating summons.

THE DECISION OF THE COURT

[16] In our judgment, with respect, there is no need for this court to determine the ownership of the Wisma Pantai at this juncture. In our opinion, the only issue for determination arising from the prayers in the originating summons is whether the appellant is obliged to reassign the Wisma Pantai to the respondent pursuant to the contract between the parties. The answer to this question, in our opinion, depends on the terms of the contract between the appellant and the respondent and the equity of redemption inherent in every transaction involving the transfer of security pending repayment of a loan.

[17] A careful perusal of the loan agreement between the parties will reveal that the loan was to enable the respondent to purchase the Wisma Pantai. According to cl 37 of the loan agreement, the appellant's right to retain the original sale and purchase agreement only survived so long as there were any monies due to the appellant. Furthermore, the consideration under the deed of assignment was clearly for the advances from the appellant for the purchase of the Wisma Pantai. In our judgment, in the light of these terms and conditions, the appellant is contractually bound to reassign the property forming the subject matter of the security upon full satisfaction of the loan amount.

[18] In our judgment, even if we are wrong in our construction of the terms

of the contract between the parties, there is an obligation in equity on the appellant to reassign the security in the form of the Wisma Pantai following the full payment of the loan amount. Cousins in their book *'The Law of Mortgages'* described the obligation in this manner:

> Redemption takes place when a mortgagor, either under the terms of his covenant or under the principles of equity, discharges the obligations imposed by the mortgage and thus becomes entitled to have his property revested in him free of the charge. Until the debt has been paid and the money accepted, however, the mortgage remains in being. The mortgagor's right is to have his property returned to him contemporaneously with the due discharge of his obligations, so that it is the duty of the mortgagee at once to execute the instrument necessary to terminate the mortgage. In *Graham v Seal*, Swinfen Eady MR said:
>
> > The obligation of a mortgagee is, as against payment of what is due to him, to reconvey and deliver up the deeds of the mortgaged premises. It is like the obligation of a vendor to convey and hand over the title deeds and the conveyance as against payment of the purchase-money. It contemplates that the handing over of the conveyance and payment of the purchase-money shall be a simultaneous transaction, so that neither party is at risk for any time without either the money or the estate; so in the paying off of a mortgage a mortgagee is not entitled to insist upon payment of the mortgage money with a view to his reconveying at some future time.
> >
> > Consequently, if a mortgagee has been fully satisfied and refuses to reconvey the security, he will have to pay the costs of any proceedings taken by the mortgagor to recover his property.
>
> (see paras 18–24 at p 379 (2nd Ed))

[19] That the appellant is under the obligation in law to return the security upon full payment even in the absence of an express clause in the agreement is evident from another passage in the same text book:

> The right to sue on the personal covenant may be lost by the mortgage's inability to reconvey the mortgaged property. Although a mortgagor's covenant for repayment is usually absolute in form and is not expressed to be conditional on the reconveyance of the security, equity treats a mortgagor's liability to pay and a mortgagee's obligation to reconvey as reciprocal. A mortgagee will therefore be restrained from suing on the covenant if, without authority from the mortgagor, he has parted with the property mortgaged. If the mortgagee is only temporarily disabled from making the reconveyance by, for example allowing his solicitor to obtain a lien on the title deeds, he is restrained from suing on the covenant until the disability has been removed by, for example, the discharge of the lien.
>
> (see paras 16–112)

[20] Based on the aforesaid principles of law, in our judgment, there is a clear

obligation in equity upon the appellant to reassign the Wisma Pantai following the payment in full of the loan. With respect, the submissions of learned counsel for the appellant and the interveners are premised on the assumption that the prayers granted by the learned trial judge are directed at Atlas. However, a careful examination of the prayers ordered by the court will reveal that the reliefs sought by the respondent and ordered by the court are solely directed at the appellant. We are conscious that the thrust of the submission of learned counsel for the appellant is that there is nothing to reassign following the rescission of the sale and purchase agreement. With respect, our answer to this submission is twofold. First, there is some doubt as to the entitlement of the liquidator of Atlas to sell Wisma Pantai without paying the monies ordered to be paid pursuant to the judgment in the 2001 suit. We are in agreement with the sentiments expressed by the learned trial judge that there is a case for contending that the order in the 2001 suit provided for rescission conditional on the refund of the purchase price. We also agree with the opinion of the learned trial judge that Kang Hwee Gee J (as he then was) notwithstanding his ruling to not restrain the liquidators from selling Wisma Pantai, nevertheless did state that his ruling was on the assumption that Atlas had refunded the purchase price pursuant to the order in the 2001 suit. Secondly, it must be appreciated that irrespective of the 'value' of the reassignment, the respondent requires a reassignment before it can acquire the locus to commence any form of proceedings against Atlas and/or its liquidators for the recovery of the monies ordered to be paid to it under the 2001 suit. We also pause to observe that consistent with its contractual obligations, the appellant did undertake to reassign the secured property vide its letter of 8 March 2011 and which undertaking was accepted by the respondent vide its letter of 22 April 2011. Indeed, the appellant even provided the format of the deed of receipt and reassignment. The appellant thereafter resiled from its undertaking citing 'pending legal issues' without providing any cogent reason as why it was anxious to protect the position of the third party Atlas to the detriment of its own customer. Accordingly, in our judgment, the issues raised in the submissions of learned counsel for the appellant and the interveners are clearly premature. These are issues, in our opinion, which need be addressed only in an action between the respondent and the liquidators of Atlas.

[21] We dismissed this appeal and confirmed the judgment of the learned trial judge but for the reasons contained herein on the conclusion of the appeal. We ordered the appellant and the interveners to each pay costs of RM10,000 to the respondent. Deposit is refunded to the appellant.

Appeal dismissed with costs.

Reported by Kohila Nesan